Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

Mitchell R. Swartz, Plaintiff,
Petitioner

v.

Schering-Plough Corporation, Plough U.S.A.,
Schering-Plough Healthcare Products,
Defendants,
Respondent

On Petition For A Writ Of Certiorari
To United States Court Of Appeals
For The First Circuit
No. 02-1001

Appealed from: United States District Court
District Of Massachusetts
(Civil Action No. 99-CV-10177)

SUPPLEMENTAL APPENDIX

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February 7, 2003

29 pp

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**** The Notations herein are to the Appendix of this Petition (e.g., App. A) and those made to the US court of appeals, in the Appeal Brief (e.g., AB12 for page 12), Appellant's Appendix (A123) or Addendum (AD12).

APPENDIX F

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (#169)

Issuing Court: US District Court, First Circuit
Number of Case: 99-10177-NG
Date of Issue: September 27, 2001

I. Introduction

On April 12, 1999, plaintiff Mitchell Schwartz (*sic*) (hereinafter "Schwartz") filed a ten-count amended complaint against defendants Schering-Plough Corporation, Plough U.S.A. and Schering-Plough Healthcare Products hereinafter collectively "Schering" or "the defendants". A ruling on the defendants' motion to dismiss in June of 1999 by the District Judge to whom the case was then assigned narrowed the scope of the litigation to a single claim for breach of contract. See Swartz v. Schering-Plough Corporation, 53 F.Supp.2d 95 (D. Mass., 1999).

The gist of Swartz's breach of contract claim is that in 1975 or 1976 documents relating to a combination sunscreen/ insect repellant (sic) topical skin care product he and others had invented were delivered to Schering pursuant to an oral confidentiality agreement. (#32 ¶26) The plaintiff contends that Schering subsequently breached the alleged confidentiality agreement when it manufactured, marketed and distributed the skin care product without first contacting Swartz and the other inventors. (#32 ¶26) With discovery now complete, Schering has filed Defendants' Motion For Summary Judgment (#169) seeking brevis disposition on the sole remaining count of the amended complaint. A memorandum of law in support (#170), a statement of undisputed facts (#171), and an affidavit of Julia Frost-Davies, Esquire, with attached documents (#172) accompanied the motion. Countering these submissions, Swartz has filed a response in opposition (#175), an affidavit of Robert Y. Berlin, Ph.D. (#176), and an affidavit of Mitchell Swartz, MD, ScD, as well as appended summaries (#177). With leave of court,

1. To be more precise, the appellation "Schering" or 'the defendants" as used herein applies only to Schering-Plough Corporation and Schering-Plough Healthcare Products, Inc. It is these two defendants that are moving for the entry of judgment as a matter of law.

Schering filed a reply brief (#180). The record is now complete and the summary judgment motion is in a posture for decision.2

II. The Facts

It is perhaps best to begin with an identification of the players. The so-called "S-B Group" referenced throughout plaintiffs paper's consists of Elizabeth Solomon Marks (hereinafter "Solomon"), Katharine (hereinafter "Ms. Berlin"), Robert Y. Berlin (hereinafter "Dr. Berlin") and Swartz. (#176 ¶2; #177 ¶2) Abe Plough was the founder of Plough, Inc., now was Schering-Plough Corporation.[3] (#176 ¶3) Harry Somson[4] (hereinafter "Somson") is a past-President and Chief Executive Officer of Schering-Plough Corporation. (#176 ¶3; #177 ¶2) Somson had a personal relationship with certain members of the S-B Group.[5] For example, he was a cousin of Ms. Berlin and a trustee of a trust of which she was a beneficiary. (#176 ¶4) It is consequent to this close relationship that the confidentiality agreement supposedly arose.

According to the allegations of the amended complaint,[6] in December of 1975 the technology, idea, business plan, formula, trademark, intellectual property, drawings for labels, logos and the container for a skin care product called SUN-BUG (collectively "Sun-Bug Documents") were delivered to Schering by members of the S-B Group pursuant to an oral confidentiality agreement. As determined in the earlier Memorandum and Order:

> **A favorable reading of the Amended Complaint allows this Court to ascertain the essential terms of the confidentiality agreement with reasonable certainty. For instance, the agreement was entered into "on or about December of 1975" by Dr. Berlin, Ms. Berlin,**

2. The motion for summary judgment has been referred to the undersigned for the issuance of a report and recommendation as to disposition pursuant to 28 U.S.C. 636(b).

3. Mr. Plough is deceased and was not involved in any aspect of this litigation.

4. Somson's name is spelled differently throughout the documents in the case file. For the sake of consistency, his name shall be spelled herein as it was in the earlier Memorandum and Order on the motion to dismiss. See Swartz, 53 F.Supp.2d at 99.

Solomon, Abraham Plough and Somson and was to "continue forward from that time." Am.Compl. at ¶7.

***

While it is true that the Amended Complaint states that "Plaintiff and Defendant never reached a [sic] agreement regarding the said confidentially-transmitted and shared idea, business, plan, formula, design technology and trademark known as SUN-BUG," this allegation refers to the failure to come to terms on a licensing agreement–not a confidentiality agreement. As described above, the terms of the confidentiality agreement are discernible.
***Swartz*, 53 F.Supp.2d at 102-3, 104.**

`Swartz specifically alleges that the Sun-Bug Documents were ". . .put in a folder marked 'confidential' and carried in hand by Ms. Solomon [Marks], Ms. Berlin and their family and delivered to [Schering] in Memphis Tennessee in December 1975 with additional information in the following months. (#32 ¶8) At his deposition Swartz testified that he "personally delivered it [the Sun-Bug Documents], handed it

5. Dr. Berlin claims he had "a long-standing and close relationship with Messrs. Plough and Solmson". (#176 ¶5) Somson, on the other hand, testified that he had briefly met Dr. Berlin "maybe three or four times" at social functions in the 1970's, and last saw him in 1975. (#172, Exh. E at 17-9)

6. Although understanding that this is a motion for summary judgment, resort is taken to the amended complaint and the Memorandum and Order on the motion to dismiss for context not provided by the parties' submissions. While the plaintiff has submitted an affidavit (#177) allegedly providing, *inter alia*, background information, it consists almost entirely of unauthenticated quotes from depositions and argument, all of which is inadmissible as evidence and, therefore, disregarded. *See* Fed. R. civ. 56(e).

7. There was some suggestion by Swartz that Solomon may have delivered the package to Schering indirectly via an intermediary, her mother, Sara Grace Holcomb. (#1.72, Exh. D at 126-8) Ms. Holcomb has submitted an affidavit wherein she denies ever having any communications with Abe Plough, Somson or anyone else at Schering about sun-Bug or any other "combination insect-repellent and sunscreen. (Defendants' Statement #171, Exh. 3 ¶¶3,4) Ms. Holcomb also specifically avers that she never delivered any documents or like materials to Abe Plough, Somson or anyone else at Schering about sun-Bug or any other "combination insect-repellent and sunscreen." (#171, Exh. 3 ¶¶5,6)

to Elizabeth Solomon [Marks], who was taking it [to Schering] (#172, Exh. D at 124) The plaintiff further stated that he "ha[d] absolute trust and confidence that Elizabeth Solomon Marks... did deliver the package labeled confidential and that it did go to [Schering]. (#172, Exh. D at 128~) Again quoting from the Memorandum and Order on the motion to dismiss:

> **The pleadings also give rise to reasonable inferences that Swartz turned over SUN-BUG information on the conditions that (i) the information would be kept confidential, and (ii) the Schering Defendants would proceed with good faith licensing negotiations at any time they chose to produce a dual-action sunscreen product. *See id.* at ¶¶8-10. While more details would certainly be helpful, those provided are sufficient to survive a motion to dismiss.**
>
> *Swartz*, 53 F.Supp.2d at 102-3, 104.

As earlier noted, the confidentiality agreement was allegedly breached in the 1990's when the defendants began to manufacture and market a combination sunscreen/insect repellant skin care product without first contacting the plaintiff.

III. The Summary Judgment Standard

When considering whether to grant summary judgment, the Court must determine whether:

> ... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> Fed. R. Civ. P. 56(c).

In making this assessment, the Court will indulge all reasonable inferences in the light most hospitable to the party opposing summary judgment, but will ignore "conclusory allegations, improbable inferences, and unsupported speculation." *Suarez v. Pueblo International, Inc.*, 229 F.3d 49, 53 (1 Cir., 2000) quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5,8 (1 Cir., 1990).

A party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact thereby entitling the party to judgment as a matter of law. *Carmona v. Toledo*, 215 F.3d 124, 132 (1 Cir., 2000).

> 'Not every factual dispute is sufficient to thwart summary judgment; the contested fact must be "material" and the dispute over it must be "genuine." In this regard, "material" means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, "genuine" means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party....

Grant's Dairy–Maine, LLC v. Commissioner of Mciine Dept. of Agriculture, Food & Rural Resources, 232 F.3d 8, 14 (1 Cir., 2000) quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1 Cir., 1995) (citations and some internal quotation marks omitted).

A factual dispute which is neither "genuine" nor "material" will not survive a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Rule 56 does not permit the party opposed to the summary judgment motion to rest upon the mere allegations or denials in its own pleadings. *See International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Center*, 103 F.3d 196,205 (1 Cir., 1996) (quoting *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1 Cir., 1992), *cert. denied*, 507 U.S. 1030 (1993)("The core purpose of the summary judgment procedure is to 'pierce the boilerplate of the pleadings' and evaluate the proof to determine whether a trial will serve any useful purpose."). Rather, Rule 56(c):

> mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. Discussion

A. Is There Evidence That A Contract Was Formed?

The defendants' position is straightforward: the plaintiff has proffered no evidence to support the allegations of his complaint. Specifically, it is argued that Swartz cannot prove that a valid, enforceable contract existed between the parties. According to Schering, the testimony of the S-B Group was uniform: each member of the group denied having delivered confidential documents to the defendants.[8] At her deposition Ms. Solomon testified as follows:

> Q. What discussion did you have with respect to contacting Schering-Plough?
> A. Again, I am not going to tell you I recall details, but conceptually I recall discussing we knew the folks at Schering-Plough because of a personal relationship. Abe we talked about, and we talked about Harry Solmson, certainly. He was a member of the family (phonetic), so he was someone I remember we talked about taking the idea to, and certainly going to the R and D department with it.
> Q. Did you, in fact, have any contact with Mr. Solmson about this product?
> A. I did not.
> Q. Have you ever had any talks with Mr. Solmson about this product?
> A. No.
> Q. Have you ever had any contact with anyone else at Schering-Plough about this product?
> A. No.
> Q. Have you ever delivered any documents to anyone at Schering-Plough concerning this product?
> A. I personally, no.
> Q. As you sit here today, can you name any individual who delivered documents regarding this product to Schering-Plough?
> A. No.

8. Swartz does not contend either that he delivered anything to Schering or that he had any conversations with any Schering representatives.

Q. ...To this day, have you had any communications with anyone at Schering-Plough in connection with this product?
A. No.
Affidavit #172, Exh. A at 26-8.9

When questioned at her deposition, Ms. Berlin stated:
Q. Okay. What was said by you and by Dr. Swartz with respect to the product being sent to ScheringPlough?
A. Mitchell told me that he put the information in an envelope marked "confidential" that was sent to Schering-Plough and did I remember that.
Q. And what did you say?
A. Nope, but I don't doubt it.
Q. Did you at any time see an envelope such as you have just described?
A. Nope.
Q. Do you have any memory of anytime yourself putting documents into such an envelope and marking them as you described?
A. No.
Q. I'll reask it. Other than the conversation that you've just described with Dr. Swartz, have you been told by anyone else that there were materials placed in an envelope marked "confidential" and delivered to Schering-Plough?
A. Have I been told that there were - that these documents were placed in an envelope and sent to Schering-Plough?
Q. Yes.
A. No.
Q. What was said during the context of your conversation with Dr. Swartz with respect to Schering's response?
A. I shared with him my memory of Schering's response.
Q. What was that memory?

9. Appended to Swartz's Affidavit (#177) is a document entitled "summary Of Admissions Made At The Deposition Of Ms. Elizabeth Solomon Marks, As Sun-Bug Business Group Member, On 5/10/00", which both quotes and characterizes portions of Solomon's deposition testimony. This document is inadmissible and, consequently, cannot be considered in deciding the dispositive motion. *See* Fed. R. civ. P. 56(e).

A. That Robert Berlin received a phone call from someone at Schering who told him that they were not interested in the product at. that time.

Q. How did you come to learn of this phone call?

A. Robert Berlin told me.

Q. As you sit here today, can you tell me of any other knowledge you personally have of Schering's response to Dr. Swartz's allegation that these materials were delivered to Schering-Plough?

A. I only know of the phone call.

Q. Do you have any memory of anything being sent to someone in R&D?

A. I don't know whether it was sent to someone in R&D, whether it was sent to someone else. I do not know who it was sent to in Schering-Plough. I am assuming-but I do not have any specific memory, and I do not recall whether I knew at the time or not-that something was actually sent to Schering-Plough because Robert Berlin told me of this telephone response that Schering-Plough was not interested at that time. So I am assuming Schering-Plough had something to respond to.

Q. Okay.

A. What it was and how it got there and who it went to, I do not know.

Q. And you don't know, in fact, whether it was an oral communication, a written communication, or what form of communication may have occurred; is that correct?

A. I don't know from my personal knowledge. I believe Mitchell swears that he put something in an envelope, but I do not know from my personal knowledge.

Affidavit #172, Exh. B at 25-8, 51~2. 10

The testimony of Solomon and Ms. Berlin is crystal clear and unequivocal. Swartz' statements and allegations notwithstanding, neither of these members of the S-B group delivered Sun-Bug Documents and information to Schering,

10. Appended to Swartz's Affidavit (#177) is a document entitled "summary Of Admissions Made At The Deposition Of Katharine Myar Berlin, As Sun-Bug Business Group Member, On 5/3/00", which both quotes and characterizes portions of Ms. Berlin's deposition testimony. This document is inadmissible and, consequently, cannot be considered in deciding the dispositive motion. *See* Fed. R. civ. P. 56(e).

nor did they have any discussions about Sun-Bug with any representative of Schering. With this state of the evidence, Dr. Berlin remains the only possible member of the S-B Group who could have entered into a confidentiality agreement with, and delivered documents to, Schering.

First, Somson's recollection of his interaction with Dr. Berlin shall be recounted:

Q. You mentioned that you have seen or spoken with Dr. Berlin several times. Three of four times was your testimony.

A. Yeah.

Q. What was the nature of those meetings or conversations?

A. Oh, it was just social. And then in 1975, I recall Miss Myar had this open house and there were quite a few people coming and going, and my wife and I went. And at that time Dr. Berlin mentioned to me that he had a formula for a suntan product with an insect repellent embodied in it, and asked me if we would be interested in a royalty agreement. I told him I didn't think so but that I would check and let him know.

Q. So you told Dr. Berlin that you didn't think that Plough would be interested but that you'd check for him?

A. I told him at the time that I didn't think so. And then I went I guess as a matter of courtesy, I went back the next day and I talked to a guy named Alfred J. Hughes, we called him Jay Hughes. And Jay was really our top sales man, and he was in charge of a group of people that sold to these chains [discount, drug and grocery chains]. We sold to other people, but they were our main source of income. And Jay didn't feel like he could create enough demand on the product to get his customers to stock it.

And I may have talked to a guy named Frank Craig. I am not sure. Frank, when we bought Coppertone, we moved the business to Memphis and did the manufacturing there and used the Coppertone building, they had a small building in Miami, as a warehouse distribution point for our whole product line. Frank joined our sales organization. And I may have talked to him about it, I'm not sure.

Q. And what was the substance of your conversation with Mr. Hughes about this formula that you're referring to?
A. It was very brief.
Q. Could you describe it?
A. Just as I indicated, he didn't think it was worth fooling with. And I called Bob and told him that we weren't interested.
Q. And do you remember what Dr. Berlin said when you told him you weren't interested, if anything?
A. No.
Q. And that was the end of your contact with Dr. Berlin as far as you remember?
A. Yes, it was.
Q. You mentioned earlier that Dr. Berlin told you that he had a formula for a combination sunscreen/insect repellent; is that correct?
A. That's correct.
Q. How long was your conversation with Dr. Berlin?
A. Very brief. Maybe five minutes.
Q. And can you just summarize, again, what Dr. Berlin said to you regarding this?
A. He said he had a formula for a suntan product combined with this antibug thing. And I was under the impression, really, that it was his, knowing he was a doctor. He didn't say that it was any-it was his, he didn't say that, but that was the impression I got.
Q. Was anyone else involved in this discussion between you and Dr. Berlin?
A. No. No. I probably mentioned it to Mr. Plough the next day. But he really wasn't active in the day-today business, and he really had no reaction to it. I'm not sure I mentioned it to him, but I probably did.
Q. You testified that you went to check with Mr. Hughes?
A. Yeah.

Q. Is that correct? And Mr. Hughes told you that the company was not interested in the combination insect repellent/sunscreen; is that correct?

A. Well, he told me he didn't think it would sell enough to justify fooling with it.

Q. And how long was your discussion with Mr.

Hughes about the combination product?

A. Very brief.

Q. Five minutes or less?

A. Not any more....

Q. After talking with Mr. Hughes, you then talked to Dr. Berlin again about this combination sunscreen?

A. I called him on the phone.

Q.. And what did you tell him, if you remember?

A. I told him-I thanked him and told him we weren't interested.

Affidavit #172, Exh. E at 19-21, 29-31."

Somson denied every having received any documents, product samples or technology about Sun-Bug or any comparable sunscreen/insect repellent combination product from Dr. Berlin or anyone else. (#172, Exh. E at 31-2) He further testified he never referred Dr. Berlin to anyone at Schering to call about the proposed product. (#172, Exh. E at 34-5) Lastly, Somson asserts that he never came to any agreement whatsoever with any member of the S-B Group regarding Sun-Bug or any comparable sunscreen/insect repellent combination product. (#172, Exh. E at 36)

11. Appended to Swartz's Affidavit (#177) is a document entitled "summary Of Admissions Made At The Deposition Of Mr. Harry B. Solmson, As President (Ret.) Of Plough, On 1/13/00", which both quotes and characterizes portions of Somson's deposition testimony. This document is inadmissible and, consequently, cannot be considered in deciding the dispositive motion. *See* Fed. R. civ. p• 56(e).

Excerpts from Dr. Berlin's deposition taken on November 29, 1999, include these exchanges:

Q. Is it contemplated by this business plan that you will get together materials and packaging and provide samples eventually to Plough?

A. Correct.

Q. Now, do you know whether or not samples were provided to Plough?

A. Yes, I do.

Q. They were?

A. Yes, they were.

Q. And who provided them?

A. They were provided by Elizabeth Solomon, one package, and I believe a general package was done, you know, in order to get the product to Plough.

Q. You are unable to identify the handwriting as not being yours?

A. It's a long time ago. I don't know if I wrote that. That could be Mitchell's, it could be sent out subsequent to that, as well.

Q. To whom?

A. Well, the first one was stewarded through the family confidentially and was stewarded through Mr. Solmson, Sarah Grace Solomon, Kay Myar, Katharine Myar. I believe Elizabeth sent that through family channels. The other one was sent to a name which we cannot remember, as a follow-up to insure that there was at least two packages.

Q. . . .Who sent the second sample?

A. My recollection is very vague on that, but I know that since I was in charge of distribution, that there's some possibility that was something that Kathy and I did. But I don't have a strong recollection about that one. But I do know that there was some stuff sent out.

Q. How was the first sample delivered, then, in the first case, first sample?

A. I believe Doctor Swartz gave Elizabeth Solomon a full packet with every page and the outside of the package marked Confidential with the understanding that this material was going through family channels to the product development team for review and that this was something that we asked Mr. Solmson about because Abe at that time was essentially retired, even though he was going in, and it would have been inappropriate to really bother him about it.

Q. By Abe you mean -

A. Abe Plough, yeah. So at that point Harry B. was not ascendant in the company. He was more part of the company. I do not believe he was the chief executive officer at that time, but he was plugged into the company and the family, and the family is, they're all mixed, Plough, Solmson, Myar, Solomon and Hahn, they're all mixed. And this is the information that was passed through on a number of sources as to whom it should be sent to and the packet went out.

Q. And you don't know to whom it was sent?

A. It was sent to Plough, you know, via, you know, Elizabeth Solomon to the product development manager. There was a name given, but it's so many years ago, I can't come up with that one.

Q. And then you said you had some role in the second sample?

A. For some reason there was a need to send it to a second location or another location or another person or something. We sent out another packet.

Q. Do you know where it was sent?

A. No, I don't know where it was sent. I don't remember.

Q. And approximately when was this done?

A. I would say the first packets went out sometime in January of '76 and I think the follow-up went out sometime in the beginning of February.

Q. Now, you said that you had a telephone conversation with in (sic) connection with these samples?
A. Well, I had a conversation with, it was a two-tiered lab at the time, to the best of my recollection, and I spoke with the fellow who sort of takes in ideas. I don't know what you'd call him, but it was two-tiered. It wasn't the director, but it was whoever submissions were made to. He then and I had some phone conversations with him about, you know, how do we get it to you...
Q. Going back to your telephone conference, when did it take place?
A. That was sort of at the beginning, sort of just after Christmas and the beginning of January.
Q. And with whom did you talk?
A. I don't remember the person's name.
Q. Do you remember what position he had or she held?
A. I think I just said to you all I remember is a two-tiered system. One was involved in taking in and one was involved in reviewing and reporting I spoke with this gentleman and then followed up to the same gentleman.
Q. Which tier was he in?
A. I don't know...
Q. Now, did there come a time when you were given the name of someone to contact [at Schering]?
A. I was given a name?
Q. Yes. Were you?
A. Later.
Q. When was that?
A. I don't know.
Q. What did you do?
A. What did I do? I think I had to send a second sort of supporting something to someplace I said, I don't remember too well.
Q. What had you done before you had to send a second-
A. I was out of the loop.
Q. You were out of the loop?
A. Uh-huh.

Q. Would you explain what you mean?
A. It was incumbent for Elizabeth to take over at that point.
Q. Elizabeth Solomon?
A. Yeah.
Q. or of (sic) the materials to Plough?
And you had no further contact with the routing
A. Except what I mentioned previously.
Q. The two telephone conversations the telephone conversations?
A. (Witness nods head).
Q. Is it your understanding that Elizabeth Solomon actually physically delivered the package containing the sample and formula to someone at Schering-Plough?
A. That's my recollection that she was involved in that part of this, yes.
Q. That is the active delivering the package to somebody at Schering-Plough?
A. Yes, yes.
Q. Who delivered the other package?
A. That was mailed.
Affidavit #172, Exh. C at 70-7, 129-30, 137.[12]

In opposition to the defendants' motion for summary judgment, on or about October 31, 2000, Dr. Berlin filed an affidavit. (#176) Like the deposition testimony, Dr. Berlin's affidavit shall be quoted at some length:

7. I spoke with Mr. Solmson in early December, 1975 and started communications covering a collaboration whereby Plough would manufacture and market our [the S-B Group's] SUN-BUG product.

12. Appended to Swartz's Mfidavit (#177) is a document entitled "Summary Of Admissions Made At The Deposition Of Dr. Robert Y. Berlin, As 5i.in-Bug Business Group Member, On 11/29/99", which both quotes and characterizes portions of Dr. Berlin's deposition testimony. This document is inadmissible and, consequently, cannot be considered in deciding the dispositive motion. *See* Fed. R. Civ. p. 56(e).

8. Mr. Solmson referred me to a number of officers and/or employees of Plough such as his assistant and a liaison person and through them to Plough's manager for new product ideas/development who I communicated with (sic).

9. This man told me the information that he needed, including where to send our package of product information.

10. I spoke with Mr. Solmson about whether we should enter into a written confidentially (sic) agreement and he said that it would not be necessary as he would protect us and I told this to members of the S-B Group.

11. Thereafter, I had written correspondence and technology transfer communications with Plough which included the detailed formula, actual product samples of our SUN-BUG sample packets and the appropriate packaging for our presentation.

12. The S-B Group shared information regarding different concentrations and duration of effectiveness for difference (sic) amounts. There are several packaging descriptions, several bases and even suggested fragrances, as well as arguments for and against camphor and some other things.

13. I spoke with Dr. Swartz, who had sent a similar package delivered through Ms. Elizabeth Solomon, who had told me of this and I also, on my own, mailed a second backup package on or about January, 1976 to the manager of new product ideas/development and, by early February, 1976, I had further communications with Plough.

14. Later, in February, 1976, I followed up on this with that man from Plough and kept the S-B Group advised.

15. By the middle of February, 1976, I called and inquired of Plough's manager for new product ideas/development to obtain status reports for our SUN-BUG product and have a vivid memory of my first conversation with him in early February, 1996, where he specifically acknowledged receipt of both packages and the materials from the S-B Group and he requested that I call him in another month so that he could keep me appraised (sic).

16. In March, 1976, I had a conversation with this Plough manager which I recall lasting approximately twenty (20) minutes. We also discussed licensing or royalty fees that Plough would pay to the S-B Group if Plough were to take on, manufacture and market our product and he gave me an approximate range of from 5 to 7%, which he said was the standard range for Plough to pay and I agreed to this.
17. I probably had three (3) conversations with said manager until around the middle of April, 1996, when he told me that Plough was in the process of change and moving away from sun care products. He told me that if Plough should ever move back in that direction, Plough would contact me and that the S-B Group would be part of the project.

Affidavit Of Robert Y. Berlin, Ph.D., #176 ¶¶7-17.

A legal issue is raised by the filing of Dr. Berlin's affidavit, to wit, what weight should be afforded an affidavit submitted subsequent to the filing of a dispositive motion that directly contradicts earlier testimony and does not adequately explain the reason for such conflict? *See Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1 Cir., 1994); *see also, Torres v. E.I.* Dupont *De Nemours & Company*, 219 F.3d 13, 20-1 (1 Cir., 2000).[13] In *Colantuoni* an employee of a general contractor brought a negligence and strict liability suit against his employer and a ladder manufacturer after a slip-and-fall accident. *Colantuoni*, 44 F.3d at 2. Following the submission of the defendant's motion for the entry of judgment as a matter of law, the plaintiff filed an affidavit containing sworn statements that directly contradicted his earlier testimony. *Colantuoni*, 44 F.3d at 2. The Court disregarded the affidavit in its summary judgment analysis because the affiant failed sufficiently to explain the direct contradiction[14] *Colantuoni*, 44 F.3d at 5. Of particular note, it was found that (i) the affidavit was submitted only after the motion for summary judgment was filed and (ii) the explanation given for the inconsistency in the evidence proffered therein was not viable. *Colantuoni*, 44 F.3d at 4-5. [15] The Court held that "[w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a

satisfactory explanation of why the testimony is changed. *Colantuoni*, 44 F.3d at 4-5.

Relying on the *Colantuoni* rationale, the *Torres* Court wrote as follows:

> Appellants' contention that they lacked the requisite knowledge of who caused their injury prior to 1992 is contradicted by the deposition testimony of Miguel A. Colon-Capeles, which indicates that by December 20, 1989 appellants were preparing a claim against DuPont. As outlined above, Colon-Capeles testified that Armando Torres requested "a certification" of the papayas he had purchased from appellants in 1986, 1987, and 1988 "because they had a claim against the DuPont company concerning a chemical which had apparently affected the sowing and the farms and the lands in which they had their 'papaya' farms." In response to a follow—up question, Colon-Capeles reiterated that Armando Torres "requested that he needed a certification what he had sold to me during the year so as to be able to support his case.
>
> After DuPont moved for summary judgment, appellants attempted to rebut Colon- Capeles's deposition

13. Such contradictory affidavits are to be contrasted with merely self-serving ones:
However, a "party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment." *Cadle Co. v. Hayes*, 116 F.3d 957,961 n. 5 (1st Cir.1997), *citing Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 706 (1st cir.1993). Santiago-Ramos' affidavit contains more than the allegations made in her complaint: it provides specific factual information based upon her personal knowledge. It may be self-serving, but it complies with the requirements of the federal rules, and we therefore must consider it together with the other evidence before the magistrate judge.
Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53 (1 Cir., 2000).

14. In his deposition the plaintiff testified that he realized the ladder might slip, but in his later affidavit stated that at all times he used the ladder he believed it to be safe and had no knowledge that it would slip. *See Colantuoni*, 44 F.3d at 5.

15. The only explanation for the conflicting evidence was that the affidavit described the plaintiffs state of mind at the time of the accident and the deposition described plaintiffs state of mind at the deposition. *See Colantuoni*, 44 F.3d at 5.

testimony by filing an affidavit from him dated July 10, 1998. In that affidavit, Colon-Capeles states "[a]fter careful reflection, I am unable to recall the reason for which Mr. Torres requested that I provide him with invoices" in 1989. Appellants also filed an affidavit from Armando Torres dated July 8, 1998, stating that he had requested the invoices in order to submit a claim for federal assistance ("FEMA") relating to Hurricane Hugo.

The district court struck both affidavits on the basis that appellants "failed to justify the suggested changes in testimony and have likewise failed to create a genuine issue of credibility."

It is settled that "[w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed." *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir.1994); *see also Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir.1993); *Trans-Orient Marine v. Star Trading & Marine*, 925 F.2d 566, 572 (2d Cir.1991); *Davidson & Jones Dev. v. Elmore Dev.*, 921 F.2d 1343, 1352 (6th Cir.1991).

Here, as in *Colantuoni*, appellants offered the affidavits of Miguel Colon- Capeles and Armando Torres "only after defendants had filed motions for summary judgment." 44 F.3d at 5. Notably, the post-summary judgment affidavit of Colon-Capeles does not indicate that there was any confusion at the time of his deposition testimony, *see, e.g., Colantuoni*, 44 F.3d at 5, nor does it allege that the prior testimony was in error. In fact, Colon-Capeles's affidavit makes no reference to the contrary statements in his deposition at all. As the district court indicated, there is simply nothing in the record that provides any explanation for why Colon-Capeles changed his testimony. *See Torres II*, slip op. at 10.

Armando Torres's July 8, 1998 affidavit fares no better. It states:

On or about December 20, 1989, I asked Miguel Colon [Capeles] of Cheche Tropical Products to provide me with certifications of the amount of papaya that he purchased from Agro Industrias from 1986 to 1988 in order to submit a claim for federal assistance ("FEMA") relating to Hurricane Hugo. I did not ask Mr. Colon

[Capeles] to prepare the certification for a claim against DuPont since I did not become aware, until the summer of 1992, that my use of Benlate 50 DF was responsible for the loss of my papaya plantations.

However, at his January 23, 1998 deposition, Armando Torres testified that he either never made a claim to the Federal Emergency Management Agency ("FEMA") or, at the very least, he did not recall whether he had made a claim to FEMA. In addition, appellants' responses to DuPont's interrogatories contain admissions that flatly contradict Armando Torres's July 8, 1998 affidavit. First, appellants stated that Hurricane Hugo damaged plantains. The certifications prepared by Colon-Capeles refer to papaya, not plantains. Second, appellants stated that as of 1989, the year Hurricane Hugo struck Puerto Rico, they were no longer planting papaya. Again, Armando Torres's affidavit provides no explanation for these contradictions.

Torres, 219 F.3d at 20-1.

In other cases, courts have excluded later-filed affidavits that purport to offer detailed recollections of events which, at the time of the earlier depositions, the deponent/affiant had no memory. See, e.g., Unterretner v. Volkswagen of America, Inc., 8 F.3d 1206, 1210 (7 Cir., 1993) "A party cannot claim a lack of general knowledge about a subject and later make a statement that requires detailed knowledge about the same subject."; Clark v. Takata Corporation, 192 F.3d 750, 759-61 (7 Cir., 19995; Acuff v. IBP, Inc., 77 F.Supp.2d 914, 927-8 (C.D.Ill., 1999)

16. Other notable contradictions exist. For instance, in his affidavit Dr. Berlin attests that "[w]e [Dr. Berlin and Schering's manager for new product idesas/development] also discussed licensing and royalty fees that [Schering] would pay to the 5-B Group if [Schering] were to take on, manufacture and market our product and he gave me an approximately [sic] range of from 5 to 7%, which he said was the standard range for [Schering] to pay and I *agreed* to *this*. (emphasis added) (#176 '116) Not only is the fact of this alleged agreement in direct conflict with Dr. Berlin's earlier testimony, but it also conflicts with the allegations in the Amended complaint and the findings of the court at the motion to dismiss stage.

Dr. Berlin's precise, detailed testimony in his affidavit contradicts his ambiguous, amorphous deposition testimony. For example, at his deposition Dr. Berlin had a "very vague" memory as to who allegedly sent the second package to Schering and that there was "some possibility" that he had done it. He also could not remember where that second package was purportedly sent. His testimony was that he thought that he "had to send a second sort of supporting something to someplace else", but that he did not "remember too well."

By contrast in his affidavit Dr. Berlin states unequivocally that he himself sent out the second package to "the manager of new product ideas/development" at Schering who thereafter "specifically acknowledged receipt of both packages and the materials from the S-B Group." Moreover, the second package was described as "includ[ing] the detailed written formula, actual product samples of our SUN-BUG sample packets and the appropriate packaging for our presentation."[6]

No explanation whatsoever has been forthcoming to explain the striking differences in Dr. Berlin's recollections. In these circumstances, Dr. Berlin's affidavit must be stricken as it was clearly filed in order to raise genuine issues of material fact so as to avoid the entry of judgment as a matter of law.

Based upon the record now before the Court, the plaintiff has failed to produce any admissible evidence to show either that he or the S-B Group entered into a confidentiality agreement with Schering or that any Sun-Bug Documents were transferred to Schering pursuant to such a confidentiality agreement. In the absence of any genuine issues of material fact, the defendants are entitled to the entry of summary judgment in their favor on the plaintiffs breach of contract claim.

B. Is There Evidence That A Contract, If Formed, Was Breached?

Alternatively, even if Dr. Berlin's affidavit were to be considered and genuine issues of material fact were found respecting the existence of a confidentiality agreement and whether Sun-Bug Documents were given to Schering pursuant to it, the plaintiffs claim must yet fail given the utter

dearth of evidence produced to establish a breach. It is to be recalled that the alleged confidentiality agreement purportedly had as its terms that (1) whatever information was given to Schering "...would be kept confidential" and that Schering "...would proceed with good faith licensing negotiations at any time they chose to produce a dual action sunscreen product." *Swartz*, 53 F. Supp. 2d. at 103. First, there is no evidence that Schering did not keep whatever information was given to it "confidential." Second, there is no evidence whatsoever that Schering ever used any information given to it. If it never used any of the information, there would have been no need to enter any negotiations for a license. Despite Dr. Berlin's statements that the second package that he allegedly caused to be delivered to Schering "included the detailed formula, actual product samples of Our SUN-BUG sample packets and the appropriate packaging for our presentation" together with "different concentrations and duration of effectiveness for difference (sic) amounts" and "several packaging descriptions, several bases and even suggested fragrances, as well as arguments for and against camphor or some other things", the plaintiff has proffered no evidence to show that whatever was transferred was in fact used in any way by the defendants.

To establish a breach, Swartz would have to prove more than that Schering produced a combination suncreen-bug repellent. When the S-B Group allegedly transferred the Sun-Bug Documents to Schering in the mid-1970s, the invention or idea of a dual sunscreen/insect repellent skin product was not novel. Schering has submitted the copy a patent for just such a product which dates back to the 1940s. (#171 ¶11; #172, Exh. G) Indeed, in answers to interrogatories the defendants have identified numerous publications and patents, including one filed by Schering in 1971, all of which reference the idea of a combination sunscreen/insect repellent product either prior to the mid-1970s or before Schering's product was introduced in 1996. (#171 ¶11; #172, Exh. F, H, I) Several of the defendants' competitors had introduced similar sunscreen/insect repellent skin products to the market before Schering did. (#171 ¶11; #172, Exh. J, K, L, M, N) Finally, the formula for the defendants' product is licensed, in part, from a third party. (#171 ¶11; #172, Exh. 0)

In these circumstances, to succeed, Swartz has to submit evidence to demonstrate, or from which it can be inferred, that Schering utilized any information in the Sun-Bug Documents in their product. The absence of evidence that Schering did not keep whatever was transferred "confidential" or that Schering used or incorporated any of the information contained in the Sun-Bug Documents in the Schering product is fatal to the claim of breach.

No such evidence has been proferred (sic). Further, in light of the evidence showing that the idea for a combination sunscreen/insect repellent skin care product was not new either at the time the Sun-Bug Documents were purportedly transferred to the defendants or at the time that Schering's product was introduced to the market in the 1990s, and the fact that the defendants' product formulation is licensed, at least in part, from a third party, it cannot reasonably be inferred that the Sun-Bug Documents were utilized by Schering.

The plaintiff has not proffered evidence sufficient to raise a genuine issue of material fact as to whether the defendants breached the confidentiality agreement and, consequently, summary judgment should enter for Schering on the breach of contract claim.

V. Recommendation

For the reasons stated, I RECOMMEND that the Defendants' Motion For Summary Judgment (#169) be ALLOWED.

VII (sic). Review by the District Judge

The parties are hereby advised that pursuant to Rule 72, Fed. R. Civ. P., any party who objects to these proposed findings and recommendations must file a specific written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation.

The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections.

The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b), Fed. R. Civ. P., shall preclude further appellate review.

See Keatingo. Secretary of Health and Human Services, 848 F.2d 271 (1 Cir., 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1 Cir., 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1 Cir., 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1 Cir., 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1 Cir., 1980); *see also Thomas v. Am*, 474 U.S. 140 (1985).

-s ROBERT B. COLLINGS
Chief U.S. Magistrate Judge
September 27, 2001

APPENDIX G - PLAINTIFF'S OBJECTION TO THE REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (#169)

Issuing Court: US District Court, First Circuit
Number of Case: 99-10177-NG
Date of Issue: October 9, 2001

Pursuant to F.R.C.P. No. 72, the plaintiff, Mitchell Swartz, herewith objects to the report and recommendation of Magistrate Judge Collings on the defendants' motion for summary judgment (#169).

Procedure

The plaintiff is unaware of any record to be transcribed because he was not advised that Magistrate Judge Collings was considering the matter and neither him nor his attorney was advised of any oral argument.

The Report and Recommendation, which is dated September 27, 2001, was mailed to the plaintiff's attorney on September 28, 2001 (without any cover letter) and received on Monday, October 1, 2001. Accordingly, this objection has been timely filed.

Objections

1. On August 14, 2001, Magistrate Judge Collings' office, by Trish, requested that a copy of the plaintiff' s opposition to the defendants' motion for summary judgment be mailed to him and this was done on August 14, 2001. A copy of the cover letter is annexed hereto and specifically states "my client Dr. Swartz wants this motion to be heard only by Judge Gertner." (Emphasis added for emphasis.) After August 14, 2001 and until October 1, 2001, when plaintiff's course received the Report and Recommendation, no communications of any sort whatsoever took place between the Magistrate Judge's office and the attorney for the plaintiff.

2. On or about November 16, 2000, the plaintiff's counsel received the defendants' motion for leave to file a reply memorandum (brief) in support of the motion for summary judgment but plaintiff's counsel has never received any notice that said motion was allowed.

3. The plaintiff believes, and based on this belief, his attorney states that Magistrate Judge Collings was not impartial in his handling of this matter but, rather, that he made a series of orders against Dr. Swartz, who was pro se until he opted to retain counsel at the time of his deposition, on or about August 22, 2000. Specifically with regard to Magistrate Judge Collings' Report and Recommendation that he was arbitrary and capricious. A critical legal issue, as stated by Magistrate Judge Collings in his report at page 16, is what weight should be afforded to Dr. Berlin's Affidavit and it is submitted that based on his bias and prejudice, he submitted no weight to the same which was both unfair and inequitable.

4. That the Affidavit of Dr. Robert Y. Berlin Ph.D., is really not at odds with his Affidavit, however, his Affidavit is much clearer on some points where his memory was not clear because he had the advantage of discussing these matters with Dr. Swartz which refreshed his memory after his deposition had been taken.

5. The plaintiff had others who have testified that they recall communications which resulted In documents, notes, formulations as well as a sample of the Sun-Bug product being turned Over to Plough, Inc. and if the defendants were to use the product, then a license agreement was to be worked out. The defendants used the product and merely cut out the plaintiff, which is a clear breach of contract.

6. Magistrate Judge Collings accepted the facts as stated in portions of depositions transcripts (taken out of context and cherry picked) but he refused to accept Dr. Swartz's Affidavit which contained accurate references to specific deposition testimony. It is submitted that if Magistrate Judge Collings required copies of the actual deposition pages, he should have requested Dr. Swartz to produce the same.

LAW

The court should consider equitable principles and fundamental fairness.

This is a simple contract case where a contractual formula for a product (Sun-Bug) was turned over to Plough, Inc.. and it was to be kept confidential until and unless the defendants decided to use the same and in that event, a license agreement would be entered into. For the anti-insect component, the defendants used the exact formulation that was supplied by the plaintiff and his Sun-Bug Group to produce "Bug&Sun" (see annexed Affidavit of Mitchell Swartz of 10/9/01).

The plaintiff requests leave to have his annexed Affidavit considered as part of the record and that oral argument be permitted on this motion.

Additionally' the plaintiff requests leave to delay the court's consideration on the defendants' motion for summary judgment for thirty (30) days until he can file a motion for summary judgment as well.

It is submitted that a fair and impartial analysis and comparison of Dr. Berlin's Affidavit with his deposition testimony will reveal that there are material issues of fact as to what Plough, Inc., did, but the fact remains that Plough, Inc. received the formulation and made a Sun-Bug product under the name Bug&Sun using the same formulations as Sun-Bug.

It is also noteworthy that the defendants have destroyed their files which conveniently permits them to disavow any knowledge of the contracts with Dr. Swartz's group and that they have marketed a product that was a "rip-off" of the Sun-Bug product.

Respectfully Submitted,

Mitchell Swartz, Plaintiff, By his Attorney,
-s Evans J. Carter, Esq. (BBO# 07660)
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